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In the Matter of)	
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IMPLEMENTATION OF THE PAY)	CC Docket No. 96-128
TELEPHONE RECLASSIFICATION AND)	File No. NSD-1-99-34
COMPENSATION PROVISIONS OF THE)	
TELECOMMUNICATIONS ACT OF 1996)	
)	

OPPOSITION OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 99-730 (released April 15, 1999), hereby opposes the Petition for Clarification ("Petition") filed by the RBOC/GTE/SNET Payphone Coalition ("RBOC/GTE/SNET") in the subject docket on February 26, 1999.² TRA opposes the Petition on both procedural and substantive public policy grounds.

The Petition is procedurally infirm because, although styled a request for clarification, it actually seeks reconsideration of a decision issued by the Commission in CC Docket No. 96-128 more than two years ago. Thus, in order for RBOC/GTE/SNET to be afforded the relief they seek,

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A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

TRA filed an opposition to the Petition on March 12, 1999, because it was not clear at that time whether notice of the Petition's filing would be published in the *Federal Register*.

the Commission would first need to initiate a rulemaking proceeding with the intent of modifying its existing call tracking and direct payment obligations for payphone-originated subscriber toll free and access code calls. TRA submits that from a public policy point of view, such action is neither warranted nor advisable. Congress has directed the Commission to eliminate, not create, barriers to participation by small businesses in telecommunications. And RBOC/GTE/SNET's unsupported allegations of "serious shortfall[s] in payments of per-call compensation" certainly do not justify imposition of dramatic new costs on small carriers in direct contravention of this clear Congressional mandate. TRA, accordingly, strongly urges the Commission to decline the RBOC/GTE/SNET invitation to not only commit reversal procedural error, but to ignore the will of Congress simply to aid payphone service providers ("PSPs") in what amounts to a simple collections matter.

I.

INTRODUCTION

In its Report and Order in the subject docket, the Commission concluded that "in the interests of administrative efficiency and lower costs, facilities-based carriers should pay the per-call compensation for the calls received by their reseller customers." The Commission reasoned that "[b]ecause they do not have their own networks, it would be significantly more burdensome for

Petition at 1.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541, ¶ 86, Order on Reconsideration, 11 FCC Rcd. 21233 (1996), vacated in part sub nom. Illinois Public Telecomm. Ass'n v. FCC, 117 F.3d 555, 560, clarified on rehearing 123 F.3d 693 (D.C. Cir. 1997), Second Report and Order, 13 FCC Rcd 1778 (1997), remanded in part MCI Telecommunications Corp. v. FCC, 143 F3d 606 (D.C. Cir. 1998), Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 (released Feb. 4, 1999), petition for review pending American Public Communications Council v. FCC, Case No. 99-1114 (filed March 22, 1999).

resellers to track calls from payphones."⁵ In addressing this issue in its *Order on Reconsideration*, the Commission reaffirmed its belief that the universe of interexchange carriers ("IXCs") upon whom the burden of tracking calls originated by, and paying compensation directly to, PSPs should be limited.⁶ Indeed, the Commission expressly rejected contentions that "resellers should... assume responsibility for the call tracking required by the *Report and Order*," reiterating that "it would be significantly burdensome for some parties... to track and pay compensation to PSPs on a per-call basis."⁷ The Commission, however, clarified that the universe of "underlying facilities-based carriers" upon which it had imposed call tracking and direct payment obligations would be defined to include all carriers that "maintained . . . [their] own switching capability, regardless if the switching capability is owned or leased.⁸"

In its Second Report and Order, the Commission declined to "revisit the issue of who is responsible for paying compensation," noting that the issue had "already [been] addressed in the Payphone Orders, and upheld by the Courts." Moreover, the Commission reaffirmed its belief that exempting switchless resale carriers from call tracking and direct payment obligations would "expedite and simplify negotiations, minimize regulatory burdens and the impact of . . . [its] decisions for all parties, including small entities. Subsequently, the Commission touted its view

Id.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Rcd. 21233 at ¶ 92.

⁷ <u>Id</u>. at ¶¶ 82, 92.

⁸ Id.

⁹ <u>Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, 13 FCC Rcd 1778 at ¶ 132.</u>

^{10 &}lt;u>Id</u>. at ¶ 163.

that its rules would "increase the efficiency of, and minimize the burdens of, the compensation scheme to the benefit of all parties, including small entities."

II.

<u>ARGUMENT</u>

A. The Petition is Procedurally Defective

More than two years after the Commission established its payphone compensation regime, RBOC/GTE/SNET urge the Commission, through "clarification" of its rules and policies, to dramatically expand the universe of IXCs upon which it initially imposed call tracking and direct payment obligations to include "the entit[ies] identified by the Carrier Identification Code ("CIC") used to route the compensable call from the Local Exchange Carrier network." RBOC/GTE/SNET suggest that in so doing, the Commission would merely be reinterpreting its existing rules and thus need not engage in "full rulemaking." This view differs sharply from than espoused by RBOC/GTE/SNET when they first offered their "'CIC' solution." At that time, RBOC/GTE/SNET characterized their proposal as a "suggested revision" to the existing rules.

The RBOC/GTE/SNET's first assessment was, of course, correct. The so-called "CIC solution" would greatly expand the universe of IXCs subject to call tracking and direct

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 at ¶ 204.

Petition at 2.

^{13 &}lt;u>Id</u>. at 2, fn. 2.

Letter from Michael K. Kellogg, counsel to the RBOC/GTE/SNET Payphone Coalition, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, dated November 17, 1998, at page 6.

¹⁵ Id. at 6.

payment obligations, in direct contravention of previously announced Commission policies. As the Commission is aware, any number of smaller IXCs have and use CICs without owning or leasing switching equipment. These carriers' CICs are merely loaded into the switches of their underlying facilities-based carriers. The "reinterpretation" advocated by RBOC/GTE/SNET, therefore, would impose new duties and obligations on a number of the very carriers the Commission exempted from call tracking and direct payment obligations because of the significantly greater burden these duties and obligations would represent for such carriers.

It is well settled that an agency may not constructively rewrite a rule by reinterpreting it. 18 Sanctioning such conduct would "render the requirements of [Section] 553 basically superfluous in legislative rulemaking by permitting agencies to alter their requirements for affected public members at will through the ingenious device of 'reinterpreting' their own rule. "19 "[T]he procedural guarantees of notice and comment . . . would not be meaningful if an agency could effectively, constructively amend regulations by means of nonobvious readings without giving the affected parties an opportunity either to affect the content of the regulations at issue or at least to be aware of the scope of their demands." 20

Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996, CC Docket No. 94-129, FCC 98-334, ¶ 154 (released December 23, 1998).

See, e.g., Attachment A.

National Family Planning and Reproductive Health Association, Inc. et al. v Sullivan, 979 F.2d 227, 231 (D.C. Cir., 1992) ("When an agency promulgates a legislative regulation by notice and comment directly affecting the conduct of . . . members of the public and, on challenge, to the . . . Court, it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule.")

¹⁹ <u>Id</u>.

Secretary of Labor v. Western Fuels-Utah, Inc., 900 F.2d 318, 327 (D.C. Cir., 1990).

Accordingly, the Commission should summarily dismiss the RBOC/GTE/SNET Petition as an untimely filed petition for reconsideration. Alternatively, the Commission should treat the RBOC/GTE/SNET Petition as a petition for rulemaking. If, however, the Commission elects to so treat the Petition, it should deny it for sound and compelling public policy reasons.

B. Grant of the Relief Sought by RBOC/GTE/SNET is Neither Warranted Nor Advisable

RBOC/GTE/SNET have wholly failed to demonstrate a need for their proposed "CIC solution," neglecting not only to document the alleged compensation shortfall, but not even bothering to attempt to establish a causal linkage between this purported shortfall and the Commission's current exemption of switchless resale carriers from call tracking and direct payment obligations. Compounding this failure, RBOC/GTE/SNET would have the Commission adopt a regime highly injurious to small carriers to address a problem they have not shown to exist, much less quantified in any meaningful sense, or shown to be resolvable by their proposed "CIC solution."

In an effort to justify their "CIC solution," RBOC/GTE/SNET claim that "the amount of compensation received from some of the major interexchange carriers has been from 20 to more than 50 percent less than the amount that Coalition members expected, based on their own records." RBOC/GTE/SNET offer no documentation or other support for this bald assertion, leaving the Commission and interested parties with no means of assessing its accuracy. In the past,

Petition at 2.

Sprint Corporation's ("Sprint") response to the RBOC/GTE/SNET "20 to more than 50 percent" underpayment claim is noteworthy. Sprint reported that it "ha[d] been contacted by just two members of the Coalition regarding possible compensation shortfalls." As related by Sprint, "[o]ne made a vague expression of disappointment with the amount of compensation, and . . . [did] not follow[] up the matter," while Sprint advised the other that the alleged shortfall "related to traffic from switch-based resellers and . . [did] not hear[] from this PSP since." Letter to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, from Richard Juhnke, Sprint, dated December 4, 1998.

the Commission has rejected such self-serving, unsupported claims of underpayment. Thus, in its *Second Report and Order*, the Commission concluded that it did not have "sufficient information to attribute an amount to bad debt and/or collection charges," because "[n]either the Coalition nor the other PSPs included specific estimates of increased collection and bad debts," while in its *Third Report and Order*, the Commission remarked that it could not determine "the percentage of uncollected per-call compensation that is due to billing errors of the PSPs, as opposed to unscrupulous carriers." Even if there were any validity to these facially suspect values, neither the shortfall, nor any significant percentage thereof, could be attributable to switchless resale carriers, much less the subset of switchless resale carriers that have deployed CICs, because resale carriers do not occupy 20 percent, much less 50 percent or more, of the interexchange market.²⁵

Having failed to document a need for their proposed "CIC solution," much less a causal linkage between the purported compensation shortfall and the Commission's current exemption of switchless resale carriers from call tracking and direct payment obligations, RBOC/GTE/SNET nonetheless urge the Commission to do damage to small non-facilities-based

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, 13 FCC Rcd 1778 at ¶ 56.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 at ¶ 162.

Zolnierek, J., Rangos, K., Eisner, J., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, <u>Long Distance Market Shares Fourth Quarter 1998</u>, Table 3.2 (March 31, 1999). In fact, AT&T Corp., MCI WorldCom, Inc. and Sprint Corporation, between them, serve roughly 80 percent of the interexchange market.

carriers in clear contravention of Congressional dictates.²⁶ The Commission is under a statutory mandate to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services . . ."²⁷ As the Commission has recognized, "small businesses represent only a small portion of the businesses in telecommunications."²⁸ To address the under-representation of small businesses in telecommunications, the Commission, noting its "strong commitment" to achieve the goals of Section 257 of the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act of 1996 ("Telecommunications Act"), has "acted to identify and eliminate market entry barriers for small businesses, to remove or reduce impediments, and to increase opportunities for small business participation in the telecommunications market."²⁹ Certainly, erecting new and substantial barriers to entry and continued participation by small businesses in the interexchange market is not consistent with this laudable approach.³⁰

The Commission has expressly rejected proposed changes to its payphone compensation regime on the grounds that they would "contradict congressional directives set forth in other sections of the Act." Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, 13 FCC Rcd 1778 at ¶ 42.

²⁷ 47 U.S.C. § 257.

Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd. 16802, ¶ 5 (1997).

²⁹ Id. at ¶ 2 (1997).

In adopting its payphone compensation scheme, the Commission referred to the estimate of a mid-size carrier "that its would require a \$1 million investment to establish a tracking mechanism for all of the calls that its network carrie[d]." Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, 13 FCC Rcd 1778 at ¶ 92. The Commission has recognized that "financial obstacles create substantial impediments to small business entry in the telecommunications market." Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Report), 12 FCC Rcd. 16802 at ¶ 42.

Consistent with this approach, the Commission, in adopting its payphone compensation mechanism, was careful to minimize the regulatory burdens and other adverse impacts on small entities, by among other things, "requir[ing]... facilities-based carriers... to pay the percall compensation for calls received by their reseller customers." As noted above, the Commission correctly concluded that "[b]ecause they do not have their own networks, it would be significantly more burdensome for resellers to track calls from payphones." The Commission, as a result, was able to report that the call tracking/direct payment mechanism it had adopted would "increase the efficiency of, and minimize the burdens of, the compensation scheme to the benefit of all parties, including small entities," by "expedit[ing] and simplify[ing] negotiations, minimiz[ing] regulatory burdens and [reducing] the impact of ... [the] decisions for all parties, including small entities.

RBOC/GTE/SNET would have the Commission reverse these well-conceived policies and burden switchless resale carriers with the very call tracking and direct payment obligations the Commission previously recognized would be highly detrimental to small IXCs. While RBOC/GTE/SNET disingenuously claim that the rule revision they seek would not cause any

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Red. 20541 at ¶ 342; Second Report and Order, 13 FCC Red 1778 at ¶ 163.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd. 20541 at ¶ 86.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Third Report and Order and Order on Reconsideration of the Second Report and Order, FCC 99-7 at ¶ 204.

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Second Report and Order, 13 FCC Rcd 1778 at ¶ 163.

hardship,³⁵ the Commission has already found otherwise.³⁶ As RBOC/GTE/SNET appear to recognize, switches provide the means for call tracking, rendering such activity impossible for a switchless resale carrier to undertake. And while RBOC/GTE/SNET are correct that small switchless resale carriers potentially could contract with their network service providers for the performance of this function, such service would come at no small cost. And, if an underlying carrier declined to provide this service, the switchless resale carrier would be unable to comply with the Commission's new requirement unless it ceased use of its CIC code. Even if its underlying carrier acquiesced in the performance of this duty, the switchless resale carrier would further need to expend substantial back-office resources to effect payments to the thousands of PSPs across the nation, thereby incurring tens, if not hundreds of thousands of dollars in additional costs.

As discussed above, the Commission has previously rejected proposals to expand the universe of carriers required to track calls and directly compensate PSPs to include switchless resale carriers. In so doing, it has appropriately reemphasized its concern regarding the adverse impacts such obligations would have on smaller carriers. Those concerns remain no less valid today than they did when first articulated by the Commission. If RBOC/GTE/SNET are indeed confronting problems in collecting per-call compensation for payphone-originated subscriber toll free and access code calls, they should file formal complaints with the Commission or avail themselves of the enforcement power of the courts, rather than inflicting severe harm on small switchless resale

Letter from Michael K. Kellog, counsel to the RBOC/GTE/SNET Payphone Coalition, to Lawrence Strickling, Chief, Common Carrier Bureau, Federal Communications Commission, dated November 17, 1998, at page 6

Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, 11 FCC Red. 21233 at ¶ 86.

³⁷ <u>Id</u>. at ¶¶ 82, 92.

carriers with CICs which, as shown above, could not be responsible for a problem anywhere near the magnitude of which RBOC/GTE/SNET have alleged. It makes no sense to penalize carriers which have complied with their statutory obligations in a ham-handed effort to strike at the few who have not. 38

III.

CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to deny as procedurally defective, or, in the alternative, as unsound from a public policy perspective, the RBOC/GTE/SNET Petition.

Respectfully submitted,

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May 17, 1999

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It is TRA's understanding that underlying facilities-based carriers are passing through to switchless resale carriers such compensation paid to PSPs as relates to the switchless resale carriers' traffic. It is further TRA's understanding that only those resale carriers which expressly certify to their underlying facilities-based carrier that they are switch-based are absolved of such pass through obligations.

ATTACHMENT A

Carrier Network Services

How far is your reach?

MCI's Carrier Network Services represents a robust suite of services, specifically designed to meet the unique network needs of Switchless Resellers. Carrier Network Services brings you the control that you need: simply, transparently and with positive impact on your bottom line. Whether you are looking for switched or dedicated outbound services, inbound services, calling cards or Operator Services, MCI can put together a package to expand your market and addressable revenue. At the same time, your minute volume will drive your rates lower across all products.

The Back-Office Support You Need...

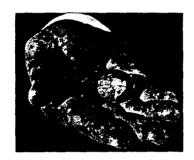
Already known for facilities-based services, MCI offers superior back office operations dedicated for switchless carriers. We offer you advanced tools to facilitate your business management. But most of all, MCI offers you the use of its state-of-the-art network.



(more)

The Control You Desire...

MCI will assist you in obtaining your own, unique CIC through LEC/Bellcore. With a solid track record behind us, you can relax while we write each ASR, report on LECs' progress with CIC loading, and manage the overall sub-CIC routing process.



Having your own CIC means you have ownership and control of your customer base. That means you reconcile "LEC Reject" orders, and can make sure that they're done right. That means one-on-one contact with the issues. Plus, you'll receive customized branding on each one of the Carrier Network Services you offer. That puts you in the driver's seat, with MCI available to help every mile down the road. And, if you plan to purchase switches in the future to become hybrid carrier, having your own CIC will facilitate your transition into the facilities-based market.

Carrier Network Services

The Unfailing Accuracy You
Demand...



When you combine the security of MCI's centralized facilities used to manage the Order entry process, with the automation of our back office support, you will be confident with the accuracy and speed of the provisioning process. Our order entry system's architecture has the flexibility to adapt to a customer's changing environment and can easily respond to your unique needs. And, our extensive portfolio of services provides you with one-stop shopping for all of your Switchless product needs.



Carrier Network Services

For questions on MCI's Switchless Program, please contact:

Carrier Product Management at (404) 673-1222



CERTIFICATE OF SERVICE

I, Evelyn Correa, do hereby certify that a true and correct copy of the foregoing document has been hand-delivered to or served by the United States First Class Mail, postage prepaid, on the individuals listed below, on this 17th day of May, 1999.

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